

When recorded, mail to:

City Clerk  
City of Flagstaff  
211 West Aspen Avenue  
Flagstaff, Arizona 86001

## **AMENDMENT NUMBER TWO**

**to  
Fourth Amended and Restated Development Agreement and Waiver  
for  
Aspen Place at the Sawmill**

The following Amendment Number Two to Fourth Amended and Restated Development Agreement and Waiver for Aspen Place at the Sawmill (this "Amendment") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2013 and is incorporated into and made a part of that certain Fourth Amended and Restated Development Agreement and Waiver dated August 11, 2010 and recorded in the Coconino County Records as Document No. 2010-3570207, as amended by Amendment One dated October 26, 2011 and recorded in the Coconino County Records as Document No. 3609215 (the "Agreement"). Capitalized terms not defined herein shall have the meaning assigned to them in the Agreement. This Amendment is made pursuant to Section 10.4 of the Agreement, which permits the City and the Owner of a portion of Aspen Place at the Sawmill to amend the Agreement insofar as it affects that Owner's portion of the Property. Accordingly, this Amendment is made by the City of Flagstaff ("City") and Flagstaff Aspen Place, LLC, a Delaware limited liability company ("Owner" or "Flagstaff Aspen Place"), as successor in interest to Aspen Place North, LLC of the Commercial Parcels.

**1. The fourth sentence of Recital A is amended as follows:**

**Exhibit C** depicts the parcels of land owned by Flagstaff Aspen Place, LLC as successor in interest to Aspen Place North, LLC an Arizona limited liability company (the "Commercial Parcels").

**2. Recital B is amended by adding a new sentence to the end thereof, to read as follows:**

The Fourth Amended and Restated Development Agreement was subsequently amended by Amendment One to Fourth Restated Development Agreement and Waiver recorded on October 27, 2011 as Document Number 3609215.

**3. The second sentence of Recital C is amended as follows:**

In regard to the Commercial Parcels, the Master Plan amends and restates in its entirety the "Revised Site Plan of the Master Plan dated December 7, 2006."

**4. Recital F is amended as follows:**

The current zoning of the Residential Parcels is High Density Residential, and the current zoning for the Grocery Parcel and Commercial Parcels is Highway Commercial.

**5. Section 2, Zoning, is amended by adding a new sentence to the end thereof, to read as follows:**

In regard to the Commercial Parcels, Flagstaff Aspen Place agrees to be subject to all the terms, conditions and stipulations of City Ordinances 2006-13, 2006-31, 2011-19 and 2013-23, attached as **Exhibit Q**, and incorporated by this reference (“Commercial Parcels Zoning Ordinances”).

**6. The second sentence of Section 3, Development Standards, is amended as follows:**

The City and Sawmill NF, LLC expressly acknowledge and agree that as consideration for Sawmill NF, LLC’s prior cooperation in the Lone Tree realignment, and prior land dedications and construction of other improvements for the benefit of the City as set forth in this Agreement, development of the Grocery Parcel will not be subject to any impact fees which may be implemented by the City in the future, but the Grocery Parcel will be subject to applicable district fees.

**7. Section 6.5, Existing Unused Utility Services, is amended by adding a new sentence to the end thereof, to read as follows:**

In regard to the Commercial Parcels, Flagstaff Aspen Place agrees to abandon all unused public utility services, including water, wastewater and reclaimed services, in compliance with the City of Flagstaff Engineering Standards. Those public utility services to be abandoned are depicted in the Abandonment of Unused Public Utility Services Plan, attached as **Exhibit R**, and incorporated by this reference. The Owner shall abandon all unused public utility services before the Building Certificate of Occupancy (BCOO) will be issued.

**8. Section 6.6.5, Open Space Requirements, is amended by adding a new sentence to the end thereof, to read as follows:**

Notwithstanding the foregoing, in regard to the Commercial Parcels, Flagstaff Aspen Place must comply with the open space requirements of the Flagstaff Zoning Code, effective November 11, 2011.

**9. Section 7, Rights- of-Way Dedication, is amended by adding a new sentence to the end thereof, to read as follows:**

Notwithstanding the foregoing, Flagstaff Aspen Place agrees to dedicate those right-of-way improvements, including the right turn lane at the intersection of East Butler Avenue and South Windsor Avenue, additional ninety degree parking along East Kensington Drive, and sidewalk improvements along South Windsor abutting frontage of the

Commercial Parcels, described and depicted in **Exhibit S**. (“Right-of-Way Improvements”). Flagstaff Aspen Place acknowledges that all improvements in the right-of-way (such as water detention facilities, sidewalks, any on-street parking spaces, landscaping) shall be maintained in perpetuity by Flagstaff Aspen Place. In addition, Flagstaff Aspen Place shall be responsible for snow removal outside the vehicular “travel way,” as depicted in **Exhibit T**, Public and Private Maintenance, attached to this Agreement. The City and Flagstaff Aspen Place may elect to jointly resurface the “travel way” and any on-street parking areas which would require Flagstaff Aspen Place to contribute, on a prorated basis, to the City for paving and re-striping the on street parking spaces. The foregoing maintenance provision shall apply to the Commercial Parcels in perpetuity, unless amended by the parties through a revised development agreement. Flagstaff Aspen Place will ensure that maintenance and repair agreements involving work in the public ways entered into by Flagstaff Aspen Place shall include the following indemnification provisions for the benefit of the City:

“Flagstaff Aspen Place agrees to indemnify, defend and hold harmless the City of Flagstaff, its officers, officials, agents and employees (“Indemnitee”) from and against any and all claims, demands, actions, liabilities, damages, losses or expenses (including court costs, attorney’s fees, and costs of claim processing, investigation and litigation) (collectively referred to as “Claims”) for personal injury or bodily injury (including death) or property damage caused, in whole or in part, by willful misconduct or negligent acts or errors of Flagstaff Aspen Place, or any of Flagstaff Aspen Place’s directors, officers, agents, employees, and contractors related to work performed to this maintenance and repair agreement.”

**10. Section 8, Construction of Public and Other Related Improvements, is amended by adding a new sentence to the end thereof, to read as follows:**

Notwithstanding the foregoing, Flagstaff Aspen Place agrees to construct the Right-of-Way Improvements described and depicted in **Exhibit S**.

**11. Section 8.1, Landscape Improvements, is amended by adding a new sentence to the end thereof, to read as follows:**

Notwithstanding the foregoing, in regard to the Commercial Parcels, Flagstaff Aspen Place agrees to construct and maintain, in perpetuity, all landscaping and irrigation improvements located within the right-of-way

**12. Section 9, Notices, is amended as follows:**

Notices. Any notice or other communication required or permitted to be given under this Agreement will be in writing and will be deemed to have been given if (1) delivered to the party at the address set forth below during normal business hours, (2) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below, with sufficient postage, or (3) given to a recognized and reputable overnight delivery service, to the address set forth below, with the person giving the notice paying all

required charges and instructing the delivery service to deliver on the following business day or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this Section.

To City:

City Manager  
City of Flagstaff  
211 West Aspen Avenue  
Flagstaff, Arizona 86001

To Owners:

Campus Crest at Flagstaff, LLC  
2100 Rexford Rd., Suite 414  
Charlotte, North Carolina 28211  
Attention: Andrew Young

Flagstaff Aspen Place, LLC  
One East Washington Ste. 300  
Phoenix, AZ 85004  
Attention: Brett Heron

Sawmill NF, L.L.C.  
Aspen Place North, L.L.C.  
7114 East Stetson Drive, Suite 400  
Scottsdale, Arizona 85251  
Attention: Donald L. Meyers

- 9.1 Notices will be deemed received (1) when delivered to the party, (2) three business days after being sent by U.S. mail, certified and return receipt requested, properly addressed, with sufficient postage, or (3) the following business day after being given to a recognized and reputable overnight delivery service.

**13. The Exhibits to the Agreement are amended as follows:**

Exhibit C	Legal Description Commercial Parcels – Modified
Exhibit Q	Commercial Parcels Zoning Ordinances
Exhibit R	Abandonment of Unused Public Utility Services Plan
Exhibit S	Right-of-Way Improvements
Exhibit T	Public and Private Maintenance

- 14. Miscellaneous.** This Amendment may be executed in any number of counterparts, each of which will for all purposes be deemed to be an original, and all of which are identical. Except as expressly amended hereby, the Agreement shall remain in full force and effect in accordance with its terms.

- 15. Waiver of Claim for Diminution in Value.** Flagstaff Aspen Place hereby waives and fully releases any and all financial loss, injury, claims and causes of action that it may have, now or in the future, for any “diminution in value” and for any “just compensation” under the Private Property Rights Protection Act, codified in A.R.S. §§ 12-1131 through 12-1138, (the “Act”) in connection with the application of the City’s existing land use laws and including Ordinance Number 2013-23 regarding the Property (collectively, the

“Laws”). This waiver constitutes a complete release of any and all claims and causes of action that may arise or may be asserted under the Laws with regard to the subject Property. Flagstaff Aspen Place agrees to indemnify, hold harmless and defend City, its officers, employees and agents, from any and all claims, causes of actions, demands, losses and expenses, including attorney’s fees and litigation costs, that may be asserted by or may result from any of the present or future owners of any interest in the Property seeking potential compensation, damages, attorney’s fees or costs under the Act that they may have, as a result of the application of the Laws upon the Property.

16. **Affordable Housing Contribution.** Flagstaff Aspen Place acknowledges the City of Flagstaff’s affordable housing set-aside policy but is not seeking any of the affordable housing incentives set forth in the 2011 City of Flagstaff Zoning Code. Flagstaff Aspen Place is aware of the many goals, policies and strategies listed in the Flagstaff Area Regional Land Use and Transportation Plan related to the lack of affordable housing units within Flagstaff. With the development of the Commercial Parcels, Flagstaff Aspen Place intends to provide market rate housing units for rental purposes. Flagstaff Aspen Place, acknowledging that the development of the Commercial Parcels will not directly impact affordable housing shortages within Flagstaff, agrees to contribute \$25,000.00 to further the efforts of the City in addressing the lack of affordable housing units within the community. Further, the City and Flagstaff Aspen Place acknowledge the contribution of Parcel 117 to the City with the recordation of the Aspen Place at Sawmill final plat. The City acknowledges that this lot will be an asset to be utilized for affordable housing purposes.
17. **Liability and Indemnification.** Flagstaff Aspen Place shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees and agents for, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, including, without limitation, reasonable attorney’s fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Amendment by City or Flagstaff Aspen Place, or nonperformance of this Amendment by Flagstaff Aspen Place.

[Signature page follows.]

IN WITNESS WHEREOF, the parties have caused this Amendment and Waiver to be executed by their duly authorized representatives as of the day and year first above written.

**City of Flagstaff**

**Flagstaff Aspen Place, LLC**

By: Flagstaff Aspen Place, LLC  
Its Manager

By: \_\_\_\_\_  
Name: Brett Heron  
Its: Manager

\_\_\_\_\_  
Gerald W. Nabours, Mayor

Attest:

\_\_\_\_\_  
City Clerk

Approved as to form:

\_\_\_\_\_  
City Attorney

STATE OF ARIZONA       )  
COUNTY OF COCONINO   )

ACKNOWLEDGMENT

On this \_\_\_\_\_ day of \_\_\_\_\_, 2013, before me, a Notary Public, personally appeared Gerald W. Nabours, Mayor of the City of Flagstaff, known to be or satisfactorily proven to be the person whose name is subscribed to the foregoing instrument and acknowledged that she executed the same on behalf of the City of Flagstaff, for the purposes therein contained.

\_\_\_\_\_  
Notary Public  
My Commission Expires:\_\_\_\_\_

STATE OF ARIZONA       )  
COUNTY OF \_\_\_\_\_ )

ACKNOWLEDGMENT

On this \_\_\_\_\_ day of \_\_\_\_\_, 2013, before me, a Notary Public, personally appeared Brett Heron, known to be or satisfactorily proven to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same on behalf of Flagstaff Aspen Place, LLC, manager of [new name], for the purposes therein contained.

\_\_\_\_\_  
Notary Public  
My Commission Expires:\_\_\_\_\_  
\_\_\_\_\_